Filed 12/3/20 Botach v. Nibo CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

BAR KOCHBA BOTACH, Plaintiff, Cross-defendant and Respondent, v. JOHN E. NIBO, Defendant, Cross-complainant and Appellant.	B298213 (Los Angeles County Super. Ct. No. BC612874)

APPEAL from an order of the Superior Court of Los Angeles County, Stephanie M. Bowick, Judge. Affirmed as modified.

John E. Nibo, in pro. per., for Appellant.

Fischer, Zisblatt & Kiss and Benjamin Kiss for Respondent.

INTRODUCTION

Appellant John E. Nibo and respondent Bar Kochba Botach sued each other, disputing the terms of a transaction involving the sale of property from Nibo to Botach. In the middle of trial, the parties orally stipulated to a settlement by which Nibo would sell the property to Botach, and placed the agreement's essential terms on the record. At the parties' request, the trial court retained jurisdiction to enforce the agreement pursuant to Code of Civil Procedure section 664.6. The parties subsequently modified their settlement by a written agreement. The written agreement required the parties to open escrow by delivering Botach's initial deposit and an executed copy of the agreement to the escrow holder within three business days of the "Effective Date" (an undefined term). The agreement identified the closing date as March 31, 2019, or any extended date to which the parties agreed.

Nibo did not return his signature on the agreement to Botach until April 1, 2019 -- the day after the default closing date. Through counsel, Botach asked Nibo to propose an extended closing date, and Nibo proposed April 26. Botach provided a copy of the agreement to the escrow holder by April 4 (within three days of Nibo's returning his signature);

the record does not reveal whether or when he delivered the deposit. The escrow holder prepared instructions reflecting Nibo's requested closing date of April 26. Nibo refused to sign them.

Botach moved to enforce the settlement agreement pursuant to Code of Civil Procedure section 664.6. Nibo opposed the motion and filed an ex parte application for a determination that the escrow instructions were invalid. He neither disputed Botach's delivery of the agreement to the escrow holder by April 4, nor raised any issue concerning delivery of the deposit. His principal argument was that the agreement -- or at least the purchase price it identified -- could not be enforced after the default closing date of March 31. The court rejected this argument, finding the parties had extended the closing date. Enforcing the oral agreement "as modified by" the written agreement, the court ordered the parties and the escrow holder to take specified steps to close escrow.

On appeal, Nibo does not dispute that the parties orally entered into an enforceable settlement agreement and modified that agreement in writing. Instead, he contends the trial court erred by: (1) purportedly enforcing the oral agreement independently of the subsequent written agreement; (2) enforcing the written agreement despite the purported expiration of the default closing date of March 31, 2019 (the day before Nibo returned his signature on the agreement); and (3) enforcing the escrow instructions despite Botach's purported failure to open escrow in the manner

required by the agreement, viz., by delivering the initial deposit and an executed copy of the agreement to the escrow holder within three business days of the "Effective Date." Botach disputes each contention. Botach also notes the trial court failed to formally enter judgment, but concedes the court's order is appealable and invites us to modify it to include a judgment.

We modify the order enforcing the parties' settlement agreement to include a judgment. (See *Critzer v. Enos* (2010) 187 Cal.App.4th 1242, 1246 [modifying order of same nature in same manner]; *Hines v. Lukes* (2008) 167 Cal.App.4th 1174, 1183 [same].) We reject each of Nibo's contentions of error. First, the court enforced the oral agreement only as modified by the written agreement. Second, the court neither misinterpreted the agreement nor otherwise erred in finding the parties had extended the closing date by agreeing to the extension through counsel. Finally, substantial evidence supported the court's implied finding that Botach timely delivered an executed copy of the agreement to the escrow holder, and Nibo forfeited his argument concerning delivery of the deposit by failing to raise it below. Accordingly, we affirm the court's order as modified to include a judgment.

PROCEEDINGS BELOW

A. *Proceedings Before Settlement*

In a March 2016 complaint against Nibo, Botach alleged Nibo had agreed to sell specified real property in Los

Angeles to Botach for $1.38 million. He further alleged Nibo had refused to complete the sale unless Botach agreed to several different or new terms, including an increase in the purchase price to $1.8 million. Among other causes of action, he asserted a claim for specific performance of Nibo's alleged obligation to sell the property to him on the original terms.

In a May 2016 cross-complaint against Botach (and parties unrelated to this appeal), Nibo alleged Botach had agreed to the $1.8 million purchase price. He asserted several tort and contract causes of action against Botach and sought, among other forms of relief, specific performance of Botach's alleged obligation to buy the property at that price.

The parties subsequently amended their pleadings in ways irrelevant to this appeal. In October 2018, the parties proceeded to trial on Botach's cause of action for specific performance and all of Nibo's causes of action against Botach.

B. *The Oral Agreement*

On October 30, 2018, after returning from a midtrial recess, Botach's counsel informed the trial court the parties had reached a settlement agreement and he wanted to put the essential terms on the record. The court explained to Nibo, who was not represented by counsel, that Botach's counsel wanted to confirm on the record that the parties had reached an agreement requiring no further judicial proceedings other than voluntary dismissal after the settlement was finalized. Nibo confirmed the parties had reached such an agreement.

Botach's counsel stated his understanding of the agreement's essential terms as follows: "We will rewrite the terms on a commercial form. The purchase price will be $1.6 million. 90-day escrow. [¶] Mr. Nibo is to deliver the property vacant and free and clear of any city violations. [¶] The deposit amount is to remain the same. [¶] There will be a 30-day contingency for -- well, let's say this, seven days for title report and 30 days for environmental." The court asked Nibo if he wished to add anything, and he responded, "Yes, the contingencies. The title report and everything else will be at the end of escrow, 90 days escrow. I will deliver everything, same period." Botach's counsel responded, "I'd like to clarify. Mr. Nibo is saying that he's going to deliver the property in 90 days free of any environmental problem?" Nibo replied, "That's correct."

At the parties' request, the court retained jurisdiction to enforce the agreement under Code of Civil Procedure section 664.6. In response to an inquiry from the court, Nibo indicated he had no questions and no desire to place anything else on the record. Deeming the action settled, the court cancelled further trial proceedings.

C. *The Written Agreement*

Nibo retained counsel to assist him in reducing the oral agreement to writing. In the course of the parties' communications about the agreement, Nibo disclosed, for the first time, that the City of Los Angeles had recorded a lis pendens against the property at issue. Botach discovered

that the city had additionally recorded an abstract of judgment against the property in an amount exceeding $2.8 million. On the final draft of the agreement, Nibo added a handwritten provision requiring Botach to allow Nibo "reasonable time" to negotiate with the city for removal of the abstract of judgment. In a March 28, 2019 email to Nibo's counsel, Botach's counsel noted Nibo's addition of this provision, and provided contact information for a city attorney with whom to negotiate. Observing that Botach might lose his funding for the transaction if escrow were unduly delayed, he notified Nibo of Botach's intent to apply to the court to enforce the settlement agreement if Nibo did not sign it before April 3.

On April 1, 2019, in response to a follow-up email from Botach's counsel, Nibo's counsel returned Nibo's signature on the agreement.[1] The agreement stated, "The parties resolved [this action] and all other disputes and differences between them in court and now modify those terms and conditions as set forth in this agreement." The purchase price was $1.55 million, including a $15,000 initial deposit.[2]

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[1] Though Botach's counsel did not request Nibo's signature on the final draft of the agreement until March 28, and Nibo did not return his signature until April 1, the agreement stated it was "dated" and "executed . . . as of" March 13. The parties' signatures were not dated.

[2] The $1.55 million purchase price reflected a $50,000 reduction from the price stated orally before the court. On appeal, Nibo acknowledges he agreed to this reduction, and does not

(Fn. is continued on the next page.)

The parties were required to open escrow by delivering the initial deposit and an "executed copy" of the agreement to the escrow holder no later than three business days after the "Effective Date" (an undefined term). The closing date was March 31, 2019, "or mutually agreed extended deadline."[3] The agreement provided that if escrow instructions were not executed, the escrow holder would be directed to suspend escrow while the parties approached the court for relief. It further provided, "At the close of escrow, the Parties will file a Request to Dismiss [this action] with prejudice. If this agreement cannot be implemented by March 31, 2019, and an extended deadline has not been mutually agreed on by [the] parties, either party may approach the court for resolution of issues or final determination of rights of [the] parties in the underlining [*sic*] case."

On April 1, 2019, after Nibo returned his signature on the agreement the same day, the parties' counsel exchanged emails concerning the closing date. Botach's counsel noted the March 31 default closing date had passed, and asked Nibo to propose an extended date. Nibo's counsel responded, "Mr. Nibo wants to close April 26th thank you." The escrow

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challenge the trial court's finding that the reduced purchase price was enforceable.

[3] The closing-date provision did not limit the form or manner in which the parties could mutually agree to extend the closing date. Separate provisions required the parties to agree to any future modification to the agreement in a signed writing.

holder identified April 26 as the closing date in the escrow instructions, dated April 4.

D. *Botach's Motion and Nibo's Application*

On April 23, 2019, Botach filed a motion to enforce the parties' settlement agreement pursuant to Code of Civil Procedure section 664.6. In a supporting declaration, Botach's counsel described the parties' execution of the written agreement and their consent, through counsel, to extend the closing date to April 26. He further declared that escrow had been opened and escrow instructions prepared, but that Nibo had refused to sign the instructions, "claiming that they need[ed] further documents." Botach asked the court to enforce the parties' oral settlement agreement as modified by the written agreement.

Nibo, no longer represented by counsel, opposed the motion. He asserted, "Nibo has not signed the Sale Escrow Instructions because it did not provide for verification of source of fund in a cash transaction and the sales price is $1.55 million." He asserted that his agreement to the $1.55 million price had been conditioned on escrow closing by March 31, and that Botach was seeking to "unilaterally" extend the price beyond that date. He also asked the court to interpret and enforce the provision requiring Botach to give him "reasonable" time to negotiate with the city for removal of the abstract of judgment. In a reply brief, Botach argued Nibo had had "more than a reasonable amount of

time" to negotiate before the April 26 closing date Nibo himself had requested.

On May 13, 2019, the trial court held a hearing on Botach's motion and continued the hearing to May 28. The court requested that in advance of the continued hearing, Botach file an amended proposed order identifying all steps necessary to close escrow by an extended closing date. Botach complied.

On May 22, 2019, Nibo filed an ex parte application for a final determination of the parties' rights. He asked the court to find the escrow instructions invalid because: (1) escrow had not closed by the March 31 closing date; (2) Nibo had not participated in the preparation of the escrow instructions; and (3) the $1.55 million purchase price identified in the instructions was invalid after March 31. He argued the parties' agreement through counsel was ineffective to extend the closing date because the agreement could be modified only by a writing signed by the parties. He neither disputed Botach's delivery of the agreement to the escrow holder by April 4, nor raised any issue concerning delivery of the deposit.

E. *The Trial Court's Ruling*

On May 28, 2019, after hearing oral argument from the parties, the trial court issued an order denying Nibo's ex parte application and granting Botach's motion to enforce the settlement agreement. The court found Nibo had failed to establish any ground for the court to decline to enforce the

oral agreement "as modified by" the written agreement. It further found Nibo had agreed, through his counsel's April 1, 2019 email, "to extend the close of escrow to April 26, 2019, as reflected in the escrow instructions dated April 4, 2019. Hence, [Botach] did not breach the Purchase Agreement . . . when escrow did not close on March 31, 2019." The court additionally ordered Nibo to pay Botach $4,400 in attorney fees incurred in moving to enforce the agreement, finding "Nibo's delay, excuses and tactics for not following through with his obligations under the transaction [were] not justified under the circumstances." The court ordered the parties and the escrow holder to take specified steps to close escrow by July 15, 2019.

The court did not enter a judgment. Nibo timely appealed from the court's order denying his application and granting Botach's motion.

DISCUSSION

Nibo does not dispute that the parties orally entered into an enforceable settlement agreement and modified that agreement in writing. Instead, he contends the trial court erred by: (1) purportedly enforcing the oral agreement independently of the subsequent written agreement; (2) enforcing the written agreement despite the purported expiration of the default closing date of March 31, 2019 (the day before Nibo signed the agreement); and (3) enforcing the escrow instructions despite Botach's purported failure to open escrow in the manner required by the agreement, viz.,

by delivering the initial deposit and an executed copy of the agreement to the escrow holder within three business days of the "Effective Date."

A. *Code of Civil Procedure section 664.6*

"If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." (Code Civ. Proc., § 664.6.) "[T]he court's retention of general jurisdiction under section 664.6 includes the court's equitable authority." (*Lofton v. Wells Fargo Home Mortgage* (2014) 230 Cal.App.4th 1050, 1061, italics omitted.) "A motion to enforce a settlement agreement under Code of Civil Procedure section 664.6 provides a summary procedure 'for specifically enforcing a settlement contract without the need for a new lawsuit.'" (*Red & White Distribution, LLC v. Osteroid Enterprises, LLC* (2019) 38 Cal.App.5th 582, 586.) This procedure serves "the strong public policy of this state to encourage the voluntary settlement of litigation." (*Osumi v. Sutton* (2007) 151 Cal.App.4th 1355, 1359-1360 (*Osumi*).)

"'"[N]othing in section 664.6 authorizes a judge to *create* the material terms of a settlement, as opposed to deciding what terms *the parties themselves* have previously

agreed upon.'"" (*Machado v. Myers* (2019) 39 Cal.App.5th 779, 790.) On the other hand, nothing in the statute precludes a trial court from exercising its equitable authority to make orders to which the parties have not agreed, where necessary to enforce the terms to which they have agreed. (See *Osumi*, *supra*, 151 Cal.App.4th at 1358-1361 [trial court "did not create a material term of the settlement or otherwise err when it extended the closing date for the [parties' agreed-upon] real property transaction," where parties had not signed purchase agreement or deposited purchase price into escrow by original closing date, rendering extension necessary to grant relief].)

"'Factual determinations made by a trial court on a section 664.6 motion to enforce a settlement must be affirmed if the trial court's factual findings are supported by substantial evidence. [Citations.] Other rulings are reviewed de novo for errors of law. [Citation.]'" (*Red & White Distribution, LLC v. Osteroid Enterprises, LLC*, *supra*, 38 Cal.App.5th at 586.) "Consistent with the venerable substantial evidence standard of review, and with our policy favoring settlements, we resolve all evidentiary conflicts and draw all reasonable inferences to support the trial court's finding that these parties entered into an enforceable settlement agreement and its order enforcing that agreement." (*Osumi*, *supra*, 151 Cal.App.4th at 1360.)

B. *Enforcement of Oral Agreement*

Nibo contends the trial court erred by purportedly enforcing the oral agreement independently of the subsequent written agreement. Not so. Consistent with the written agreement's express provision that it modified the oral agreement, the court enforced the oral agreement only "as modified by" the written agreement. Nibo fails to identify any term of the oral agreement which was inconsistent with the written agreement and nevertheless enforced by the court.

C. *Extension of Closing Date*

Nibo contends the court erred by enforcing the written agreement despite the purported expiration of the default closing date of March 31, 2019. He argues the court erred in relying on the parties' agreement to extend the closing date because there was no evidence that (1) the parties agreed to the extension in a signed writing, as purportedly required by the agreement; or (2) Nibo agreed to the extension personally, rather than through counsel, as purportedly required by law.

The court did not misinterpret the agreement or otherwise err in finding the parties had extended the closing date. The agreement provided that the closing date was March 31, 2019, "or [a] mutually agreed extended deadline." Because the extension was authorized by the original language of the closing-date provision, it was not a modification of the agreement that, under separate

provisions, would require a writing signed by the parties. The closing-date provision required only the parties' mutual agreement to the extension, which was established by the evidence. Nibo did not return his signature on the agreement until the day after the March 31 default closing date, rendering the agreement impossible to perform absent an extension. Almost immediately after receiving Nibo's signature, Botach's counsel emailed Nibo's counsel to request an extended closing date, and Nibo's counsel responded with Nibo's proposal of April 26. Botach evidently agreed to Nibo's proposal, as the escrow instructions identified April 26 as the closing date. Thus, the court properly found the parties had extended the closing date to April 26.

Levy v. Superior Court (1995) 10 Cal.4th 578, on which Nibo relies, is inapposite. There, interpreting the language of Code of Civil Procedure section 664.6, our Supreme Court held the signature of a party's counsel insufficient to render a settlement agreement enforceable, in the absence of the party's personal signature or oral stipulation in court. (*Levy v. Superior Court*, *supra*, at 580-586.) The court did not address any contractual provision for the extension of a deadline, or suggest that a party's consent to such an extension is ineffective if communicated through counsel.

In sum, Nibo fails to show the court erred in finding the parties had extended the closing date.

D. *Delivery of Agreement and Deposit to Escrow Holder*

Nibo contends the trial court erred by enforcing the escrow instructions despite Botach's purported failure to open escrow in the manner required by the agreement, viz., by delivering the initial deposit and an "executed copy" of the agreement to the escrow holder within three business days of the "Effective Date."

We find no merit in Nibo's argument that Botach failed to timely deliver an executed copy of the agreement to the escrow holder. Substantial evidence supported the court's implied finding that Botach timely delivered it within three days of the undefined "Effective Date." Because it would have been impossible to deliver an "executed" copy of the agreement before the agreement had been executed, the Effective Date reasonably must be interpreted as the date of execution. The April 1, 2019 email through which Nibo's counsel returned Nibo's signature on the agreement was substantial evidence that the date of execution was April 1.[4] Nibo did not dispute that Botach delivered the agreement to the escrow holder by April 4. This delivery was timely, as

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[4] No evidence corroborated the agreement's statements that it was "dated" and "executed . . . as of" March 13, 2019; the parties' signatures were not dated. In any event, "'[u]nder the substantial evidence test, the pertinent inquiry is whether substantial evidence supports the court's finding -- not whether a contrary finding might have been made.'" (*In re Marriage of Ankola* (2020) 53 Cal.App.5th 369, 380.)

April 4 was within three business days of the April 1 "Effective Date."

We decline to reach the merits of Nibo's similar argument concerning delivery of Botach's deposit, finding Nibo forfeited the argument by failing to raise it in the trial court. Though Nibo argued in his opposition brief and subsequent ex parte application that the escrow instructions were invalid, he failed to raise any issue concerning the deposit. He thereby deprived Botach of notice of any need to develop the record on this issue. Accordingly, he forfeited this argument on appeal, and we decline to review it. (See, e.g., *Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 92 [appellant forfeited contention by failing to raise it in trial court, and Court of Appeal declined to review forfeited contention "[g]iven that the parties did not develop the factual record below to allow for a fair review"].)

In sum, Nibo fails to show any defect in the opening of escrow, and therefore fails to show the court erred by enforcing the escrow instructions.[5]

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[5] In addition to asking us to reverse the trial court's order, Nibo asks us to instruct the court to determine, on remand, the rights of the parties in the underlying case, and identifies the following arguments he believes the court should consider in doing so: (1) Botach's complaint failed to state facts sufficient to state a cause of action for specific performance; (2) Botach lacked standing; (3) Botach suffered no damages from Nibo's actions; and (4) Botach's request for specific performance is barred because Botach breached the parties' original purchase agreement and intentionally misrepresented facts. We need not
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DISPOSITION

The order denying Nibo's ex parte application and granting Botach's motion to enforce the parties' settlement agreement pursuant to Code of Civil Procedure section 664.6, as modified to include a judgment (see *Critzer v. Enos*, *supra*, 187 Cal.App.4th at 1263), is affirmed. Botach is entitled to his costs on appeal.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.

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address these arguments, as they are irrelevant to the order from which Nibo appealed, and Nibo failed to establish any ground for reversal or remand.